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Issue Date: 02 April 2003

Case No.: 2001-LHC-3204

OWCP No.: 5-110655

In the matter of

JAMES D. ANDERSON
Claimant,

v.

ASSOCIATED NAVAL ARCHITECTS
Employer.

Appearances:
John H. Klein, Esq., for Claimant
Nash Bilisoly, Esq., for Employer

Before:
DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*. James D. Anderson ("Claimant") sought compensation for an injury sustained in the course of working for Associated Naval Architects ("Employer"). A formal hearing was held on June 5, 2002, in Newport News, Virginia. Claimant offered exhibits CX 1 through CX 9; Employer offered exhibit EX 1.[1] The record remained open for additional evidence, which upon receipt were received and marked as CX 10-12 and EX 2. All evidence was admitted without objection. The parties agreed to stipulations on the record and both

[1]The following abbreviations will be used as citations to the record:
CX - Claimant's Exhibit
EX - Employer's Exhibit
Tr. - Transcript of 6/5/2002 hearing

parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Claimant and Employer stipulated to, and the court finds, the following facts:

1. The parties are subject to the jurisdiction of the Act;

2. An Employer/Employee relationship existed at all relevant times;

3. Claimant suffered an injury to his lower back on September 13, 2000, while in the course of his employment with Employer;

4. Claimant gave Employer timely notice of the injury and filed a timely claim for compensation;

5. Employer filed a timely First Report of Injury and a timely Notice of Controversion;

6. The average weekly wage at the time of the injury was $830.00, resulting in a compensation rate of $553.33.

7. As a result of the injury, Employer paid Claimant for temporary total disability from December 21, 2000, through July 11, 2001.

8. As a result of the injury, Employer paid Claimant for temporary partial disability from July 12, 2001, through March 4, 2002, at the rate of $319.96 per week.

9. As a result of the injury, Employer paid Claimant for temporary total disability from March 5, 2002, to the present and continuing.

ISSUES

1. Whether Claimant's neck injury, sustained while pursuing a job lead provided by Employer's vocational rehabilitation counselor, is a compensable consequence of his work-related back injury, thereby making Employer responsible for periods of total disability compensation.

2. In the event that the neck injury is found not to compensable, whether Employer correctly established Claimant's wage earning capacity as $10-$12 per hour or if

Claimant is entitled to additional temporary partial disability compensation from July 12, 2001, to March 4, 2002, based upon a wage earning capacity of $6.00 per hour.

3. Whether Claimant's present psychiatric condition, which allegedly developed subsequent to his work injury, is a result of his work-related back injury, thus entitling him to benefits for such condition.

FINDINGS OF FACT

Hearing Testimony of James Anderson, Claimant

Claimant was employed as a ship fitter, welder, burner, and operator for Employer. Tr. at 18. He suffered a low back injury on September 13, 2000, while in the course of his employment. *Id.* Claimant was initially treated by Dr. Nakorn, a family doctor. Tr. at 19; CX 3. He was then referred to two specialists, Dr. Berqfield and Dr. Datyner. *Id.* Claimant was also treated by Dr. Kerner, who practices in the same office as Dr. Datyner. *Id.*

As a result of his injury, Claimant was given a functional capacity evaluation ("FCE"). Tr. at 20. Thereafter, Dr. Kerner and Dr. Datyner imposed medical restrictions upon Claimant of no lifting greater than 20 pounds, no repetitive bending, no twisting, bending or scooting, no ladder climbing, and no stairs. *Id.*; CX 2 at c. Due to these restrictions, Claimant was unable to return to his pre-injury work. Tr. at 21. Claimant then began working with vocational rehabilitation counselors in an effort to find other work. Tr. at 22.

In June of 2001, Claimant was assigned to Barbara Byers and Linda Augins, vocational rehabilitation counselors. *Id.* The goal was to locate job opportunities for Claimant in the local labor market that would fit within his doctor's restrictions. *Id.* The counselors provided Claimant with lists of places that had job openings so that he could contact them about employment. Tr. at 23. However, Claimant found some of the suggested places not suitable, in his opinion, and he did not contact them. *Id.* For example, Claimant refrained from contacting possible employers which would have required travel either across and bridge or through a tunnel to reach the job location, as he had developed a phobia of bridges and tunnels since his back injury.[2] Tr. at 23-24. Claimant testified that the vocational counselors were aware of this phobia. Tr. at 27. In addition, Claimant

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[2]At the hearing, Claimant testified as follows concerning his fear of bridges and tunnels:

> Before that accident, I didn't have no problems. Since then, it's hard to go through a tunnel. You want to pull over and not go through it. You're struck in traffic, your head, you lose it, you get tight in the low back and it goes all the way up and goes into your head, and you just - - it's just like looking through a wheat field, you know, you just - - it - - my feet go numb, my feet up to my knees, my legs shake while driving. It all starts at the lower back and makes everything bad.

Tr. at 26.

testified that there was at least one other possible position that he declined to apply for because he felt he was physically unable to perform the job. Tr. at 44-45.

While working with Ms. Byers and Ms. Augins, Claimant did contact a number of employers seeking employment. CX 8. He returned the results of his job search efforts to the counselors every week for approximately two months. *Id.*

During this job search process, Ms. Byers and Ms. Augins referred Claimant to a bulldozer/heavy equipment operator position, as he had worked in these capacities in the past and such tasks were purportedly within his capabilities, as suggested by his FCE. Tr. at 27-29. Claimant did not believe that this was a position he was physically capable of performing because of his back injury. Tr. at 29. Claimant understood that this position would require twisting, bending, crawling, and vibratory impacts - all of which he was restricted from doing. *See* EX 2. He, therefore, believed that he should not have applied for this position. Tr. at 45-47. Nevertheless, he testified that he felt pressured by the vocational counselors to pursue this job opening, thus he went to the employer to be interviewed. Tr. at 30-31. After several unsuccessful attempts to speak with hiring personnel, on July 10, 2001, Claimant was interviewed by the supervisor. Tr. at 31.

Upon completion of a lengthy written application and oral interview in which Claimant showed the potential new employer his FCE, Claimant was asked to perform a bulldozer test. Tr. at 31. Claimant was provided with a hard hat and safety glasses and asked to grade a portion of a hard dirt road with the bulldozer. Tr. at 32. Claimant testified that he was on the bulldozer for approximately ten minutes when he felt a jerk and then pain. *Id.* He testified that his low back hurt, his feet were numb, and his neck and shoulders hurt. *Id.* He further noted that he had not had any neck problems prior to the episode on the bulldozer. *Id.* Two days later, Claimant returned to his treating physicians, Drs. Kerner and Datyner, about his condition. *Id.* On September 12, 2001, Dr. Kerner performed surgery on Claimant's neck. Tr. at 32-33.

Eventually, Claimant found employment on his own. He began working for Supreme Petroleum Gas Station #102 on August 8, 2001, as a full service gas station attendant. Tr. at 33; CX 7. His duties included greeting customers, filling vehicles with petroleum, and collecting money. *Id.* He demonstrated a good work attitude, was on time for work, and remained quite disciplined during his shifts. Tr. at 33; *see also* CX 9. He was unable to continue this position, per his doctor's instructions, pending his neck surgery. Tr. at 34; CX 2 at a. Subsequent to the neck surgery in September 2001, Claimant was out of work until the spring of 2002. Thereafter, he returned to his job at Supreme Petroleum. He is currently working and being paid temporary partial disability compensation by Employer.

Deposition Testimony of Barbara Byers

Barbara Byers is the owner of Atlantic Rehabilitation Services. CX 12 at 5. She is a certified rehabilitation counselor in Virginia and is certified by the Office of Workers'

Compensation Programs. *Id.* Ms. Byers was asked by Employer's carrier to complete a labor market survey and to provide job placement services to Claimant. CX 12 at 6.

On June 4, 2001, Claimant met with Ms. Byers and Ms. Augins. CX 12 at 7. Results of the testing performed by Ms. Byers revealed that Claimant fell below average on the arithmetic achievement score and his I.Q. was at or below average. CX 12 at 8. Ms. Byers also reviewed Claimant's FCE and medical records. CX 12 at 9.

Ms. Byers provided job placement services to Claimant. CX 12 at 10. He was required to attend weekly meetings, where Ms. Byers provided him with job leads and interviews. *Id.* Claimant was to follow-up with the employers. *Id.* Ms. Byers would then provide feedback as to how he might improve on his applications. *Id.* Concerning applications, Ms. Byers confirmed that her company does not recommend that a person with medical restrictions list all of the restrictions and medical history to a potential employer. CX 12 at 25-26. Claimant was uncomfortable about this procedure and in fact contacted Ms. Byers about it. *Id.* Ms. Byers told him not to mislead any employers on what he could perform. *Id.*

Ms. Byers testified that she was aware that Claimant had not been in contact with all of the job leads cited by her company. CX 12 at 28-29. She did not discuss with Claimant his failure to apply for all of the jobs. CX 12 at 30-31. Ms. Byers did, however, confirm that Claimant had expressed concern about not being able to apply for jobs because he was frightened of tunnels and bridges, some jobs were too far away, and he had some pain. CX 12 at 33-35. She also testified that Claimant told her that submitting applications for jobs was a waste of time because nobody was going to hire him. CX 12 at 34. She stated that she discussed these concerns with Claimant. CX 12 at 33-35.

In particular, Ms. Byers informed Claimant of a job opening with Waste Management Services as a bulldozer equipment operator. CX 12 at 11. Claimant had informed her that he had worked as a heavy equipment operator in the past and that he enjoyed that kind of work. *Id.* Ms. Byers understood that the job required no lifting; the employer told her that the job was within Claimant's restrictions. CX 12 at 13. Thus, she believed it would be an appropriate position for Claimant. *Id.* She advised Claimant to apply for the job. *Id.*

Ms. Byers confirmed that Claimant had indeed applied for the job. She stated that she was aware that he performed a bulldozer test during the interview. CX 12 at 14. Claimant then reported to her that he had some back pain after driving the bulldozer. CX 12 at 15.

On July 10, 2001, Ms. Byers sent to Claimant's physician, Dr. Datyner, a set of job descriptions for her to review and approve as to whether or not they were within Claimant's restrictions. CX 12 at 17. On July 23, 2001, after the bulldozer incident, Dr. Datyner approved the job descriptions, including the heavy equipment operator position at Waste Management Services. CX 12 at 18.

Ms. Byers compiled a Labor Market Survey for June and July 2001. CX 12 at 20-23. She contacted potential employers to determine job titles, dates of availability, physical demands, requirements, and salary information. CX 12 at 11-12. She then identified several available jobs which she felt were within Claimant's capabilities, given his age, education, work experience, and physical restrictions. CX 12 at 20. The jobs identified ranged in wages from $6.39 to $12.00 per hour, resulting in an average wage-earning capacity of $8.75 per hour. CX 12 at 23. Ms. Byers concluded that Claimant had an earning capacity of $10 to $12 per hour. *Id.*

Deposition Testimony of Francis C. DeMark, Jr.

Mr. DeMark is a rehabilitation counselor with Coastal Vocational Services. CX 11 at 3. He is a certified vocational rehabilitation provider for Virginia and is approved as a vocational rehabilitation consultant by the Office of Workers' Compensation Programs. CX 11 at 4-5. Mr. DeMark was hired to evaluate Claimant's vocational options and determine if Claimant had a wage earning capacity for the period in dispute. CX 11 at 19-20, 23; *see also* CX 6 at a. He reviewed all of the medical records and vocational evidence pertaining to Claimant's case. CX 11 at 6-7. He met with Claimant on November 7, 2001. CX 11 at 6.

Mr. DeMark agreed with Ms. Byers' descriptions of Claimant's capabilities, however, he disagreed with her report which indicated that Claimant had a wage earning capacity of $10 to $12 per hour. CX 11 at 6. Mr. DeMark noted that Claimant's training and experience was primarily associated with shipbuilding and mechanical trades. CX 11 at 9. He concluded that this limited Claimant's transferable skills, thus his chance of obtaining other employment was limited. CX 11 at 9-10. Although he did not conduct a labor market survey, he reviewed Ms. Byers' survey and compared it to the competition in the labor market during the same time period. CX 11 at 10. He determined that given Claimant's post-injury profile and his medical restrictions, his earning capacity would be limited to $6.00 per hour. *Id.* He believed that this was consistent with Claimant's job at Supreme Petroleum, which paid $5.60 per hour. CX 11 at 11.

In addition, Mr. DeMark felt that the job description for the bulldozer operator, as listed by Ms. Byers, was not an adequate description. CX 11 at 14; CX 6 at a-b. Specifically, Mr. DeMark noted that although Ms. Byers indicated there would be no exposure to extreme temperatures, this was not possible, as the position was performed outdoors. CX 11 at 15. Moreover, Mr. DeMark stated that kneeling, squatting, pushing and pulling would be required in this position, despite Ms. Byers' statement that such activities would be non-existent. CX 11 at 15-17. Finally, Mr. DeMark found that the position would require activities, such as exposure to vibrations and impact, which Claimant should not be exposed to, pursuant to his FCE. CX 11 at 17. Mr. DeMark concluded that The Dictionary of Occupational Titles provided a more clear and precise description of the job, including the physical abilities required. CX 6 at b-e. According to Mr. DeMark, had Dr. Datyner seen the description as listed by the DOT, she may not have approved that job.

Medical Evidence

Claimant was treated by Drs. Datyner and Kerner at the Spine Center for his work-related back injury.[3] *See* CX 1. He was placed on work restrictions of no lifting greater than 20 pounds; no repetitive bending, twisting, crawling, scooting or ladder climbing. CX 1 at o. On May 16, 2001, Claimant discussed his panic attacks associated with bridges and tunnels with Dr. Datyner. Dr. Datyner found him to be neurologically intact and recommended he see a psychiatrist or psychologist. CX 1 at h. He released Claimant to work consistent with the FCE and suggested vocational rehabilitation. CX 1 at g.

On August 1, 2001, Claimant returned to Dr. Datyner complaining of pain in his neck, radiating down the left arm and left scapula. CX 1 at e. Claimant described the bulldozer incident to Dr. Datyner. *Id.* Dr. Datyner ordered an EMG, x-rays, and a MRI of the neck to rule out disc herniation or radiculopathy. *Id.* The cervical MRI revealed a moderately large disk herniation on Claimant's left side at C5\C6. CX 1 at f; CX 4 at c. Dr. Datyner opined that Claimant's pain was "causally related to the bulldozer-riding episode . . . [which] was related to a job interview . . . [t]herefore, in my opinion, his present cervical problems are work related." *Id.* Dr. Datyner recommended surgical intervention and referred Claimant to Dr. Kerner for surgical evaluation of his neck. *Id.*

On August 29, 2001, both Drs. Kerner and Datyner evaluated Claimant, explained the risks, benefits, and complications of surgery to the cervical region. CX 1 at c. Claimant's surgery was performed on September 12, 2001. CX 5 at a. Claimant recovered well from surgery; his main post-operative complaint concerned his lower back, not his neck. CX 1 at b. Dr. Kerner continued the physical restrictions of no lifting heavy objects or bending to lift. *Id.* He did not release Claimant to return to work until April 24, 2002. CX 2 at g.

On October 5, 2001, by letter addressed to Employer's counsel, Dr. Datyner stated that Claimant' cervical injury [bulldozer neck injury] was "not related to the lumbar injury [work-related lower back injury] itself. Furthermore, the lumbar injury did not predispose [Claimant] to the cervical disc condition." EX 1.

Report of Dr. Paul Mansheim

Dr. Paul Mansheim, a board certified psychiatrist, saw Claimant for an Independent Medical Examination ("IME") on November 21, 2002. EX 2. He reviewed Claimant's medical records and the hearing transcript and interviewed Claimant for one hour. *Id.* On December 6, 2002 Dr. Mansheim prepared a report of his findings. *Id.* He opined that Claimant suffered from anxiety disorder, that the possibility of alcohol abuse should be considered, and that Claimant had a personality disorder with self-defeating features. *Id.* at 14-15. Finally, he determined that Claimant did not suffer from post-traumatic stress disorder as a result of the work injury. *Id.* at 14.

[3]Claimant's condition post-injury, was assessed as degenerative discs at L3-L4, L5-S1, diffuse disc bulge with paracentral disc protrusion at L5-S1, and facet hypertrophy. He was prescribed medication and aqua therapy (he did not do well with gym therapy); surgery was not recommended.

Dr. Mansheim concluded that "there is no indication that [Claimant's] complaints of fear when driving over bridges and tunnels is related in a cause and effect fashion with the September 13, 2000, work-related incident. In my opinion, patient's condition is marked by many features of a personality disorder." EX 2.

Deposition Testimony of Dr. Shaista Ashai

Dr. Shaista Ashai was deposed on January 28, 2003. She is a psychiatrist licensed to practice medicine in Virginia, but is not yet board certified. CX 10 at 5. She evaluated Claimant and diagnosed him with major depression, generalized anxiety disorder and panic disorder with agoraphobia. CX 10 at 6. Dr. Ashai stated there is reasonable expectation for improvement of Claimant's symptoms with antidepressant medications and therapy. CX 10 at 11.

When asked whether Claimant's fear of bridges and tunnels was related to his work injury, she replied "I cannot say for sure that it is related to that incident because . . . I don't have any evidence that it is directly related to that . . . there can be a probability that it might be because of that work-related injury." CX 10 at 8.

Dr. Ashai also reviewed Dr. Mansheim's report which concluded that Claimant's bridge and tunnel phobia was not related to his work injury. She was asked whether she agreed with his conclusion, and she replied "I don't disagree with him . . . " CX 10 at 10. Dr. Ashai appeared to disagree only with the definitiveness of Dr. Mansheim's opinion, as she believed "a definite association is hard to prove." CX 10 at 20.

CONCLUSIONS OF LAW

Issue #1 - Claimant's Neck Injury

Claimant contended that his neck injury, which occurred while he was participating in a job placement program authorized by Employer, is a compensable consequence of his work-related injury, thereby making Employer responsible for temporary total disability benefits from July 12, 2001, to August 7, 2001, and from August 21, 2001, to March 4, 2002. Employer argued that this claim for additional benefits for the neck injury should be denied, as Claimant's neck injury was unrelated to his original work injury. Employer contended that Claimant's act of driving the bulldozer, the sole cause of the injury, was an intervening act which broke the chain of causation. Thus, according to Employer, it is not a compensable consequence of the work-related injury and Claimant has been properly compensated for the injury related to his work.

The issue is whether there existed a causal connection between Claimant's cervical injury and his employment with Employer. The court finds that the neck injury is a compensable consequence of the work related injury. Thus, Claimant is entitled to total disability compensation for the periods in question.

Section 2(2) of the Act requires that the claimant's injury arise out of and in the course of employment.[4] 33 U.S.C. § 902(2). Grounded in its humanitarian purpose, § 20(a) of the Act aids a claimant in proving that an injury arises out of and in the course of employment by creating a presumption that, in the absence of substantial evidence to the contrary, an injury is work-related. *See Leydin v. Capital Reclamation Corp.*, 2 BRBS 24, 27 (1975); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601, 602 (1982). To benefit from this presumption, a claimant need not affirmatively establish a causal connection between work and the injury. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Instead, a claimant must prove the two elements of a *prima facie* case for compensation: (1) that the claimant sustained physical harm; and (2) that an accident occurred or that working conditions existed which could have caused the harm. *See Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981).

In this case, Claimant has proven that he sustained physical harm. A claimant need not show that he has a specific illness or disease in order to establish that he has suffered an injury under the Act, but need only establish some physical harm, i.e., that something has gone wrong with the human frame. *Brown v. Washington Metro. Area Transit Auth.*, 9 BRBS 233 (1978); *see also Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981) (credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case for § 20(a) invocation).

Claimant testified that while driving a bulldozer during a job interview, he felt a jerk and then pain in his low back, his feet were numb, and his neck and shoulders hurt. He subsequently /underwent surgery for his neck injury. No doctor has disputed the diagnosis or the need for surgery. Therefore, Claimant has established the fact of injury or harm necessary for a *prima facie* case for § 20(a) invocation.

The second prong concerns whether an accident occurred or conditions existed at work which could have caused the harm. In proving this point, a claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the harm. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148, 152 (1989). Rather, a claimant must show only the existence of working conditions "which could conceivably cause the harm alleged." *Id.* The claimant's theory, however, as to how the injury occurred must go beyond "mere fancy." *Id.; see also Wheatley v. Alder*, 407 F.2d 307, 313 (D.C. Cir. 1968).

The issue here is not whether the bulldozer incident was responsible for the neck injury, as the medical evidence firmly establishes this to be true. Rather, it is whether the bulldozer incident arose out of and in the course of employment. The Board has held that in order for an injury to be considered "arising out of and in the course of employment," the injury must be shown to have occurred within the time and space boundaries of the employment and in the course of an activity

[4]Section 2(2) defines a compensable injury as an "accidental injury . . . arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment . . ." 33 U.S.C. § 902(2).

whose purpose is related to the employment. *Wilson v. Washington Metro. Area Transit Auth.*, 16 BRBS 73 (1984); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 592 (1981).

Claimant contended that he was in the course of his employment with Employer while interviewing for the job with Waste Management Services, as he was participating in a vocational job placement program at the sole request of Employer. Employer's goal in rehabilitating Claimant and returning him to work was to limit its disability compensation liability. Claimant's failure to comply with the program would arguably have jeopardized his entitlement to continued disability benefits, as Employer would no doubt have sought to extinguish disability based on available suitable alternate employment and Claimant's lack of due diligence in obtaining work. Therefore, Claimant's participation in the vocational rehabilitation with Ms. Byers was compelled at Employer's insistence. This is sufficient to conclude that the bulldozer incident "occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment." Wilson, 16 BRBS at 75; Mulvaney, 14 BRBS at 593. Thus, the neck injury arose out of and in the course of employment. *See, e.g., Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987) (employee injured while engaged in vocational testing at the behest of employer). In *Mattera*, the Board concluded that

> [S]ince claimant allegedly injured his back while undergoing vocational testing in connection with his work-related arm injury, the back injury he allegedly sustained during the course of the testing is covered under the Act because it necessarily arises out of and in the course of his employment. Clearly, claimant would not have been undergoing vocational rehabilitation testing if he had not injured his arm during the course of employment.

Id. at 45.

Accordingly, because Employer chose the time, place, and circumstances of the vocational rehabilitation program, and Claimant's failure to submit to the program would have been detrimental to his continued disability compensation, Employer exercised sufficient control over Claimant so as to bring the neck injury within the scope of the initial injury. Claimant was engaged in an activity whose purpose was related to his employment, thereby rendering the activity arising out of and in the course of employment.

The court concludes that Claimant suffered an injury and working conditions existed which conceivably could have caused the alleged harm. Thus, in viewing the evidence presented by Claimant alone, Claimant has established a *prima facie* case for compensation, thereby invoking the § 20(a) presumption that his injury was work-related.

The court does not agree with Employer's argument that Claimant's conduct in choosing to apply for employment at Waste Management Services and to drive the bulldozer constituted an intervening event, which breaks the chain of causation to his original work injury. Despite the fact that Claimant did opt not to apply for several of the jobs suggested to him by Ms. Byers, the fact

remains that Claimant only attended this particular job interview at the behest of Employer's vocational counselor. Operating on incorrect assumptions concerning the level of physical activity involved in this position and because Claimant had performed this type of work previously, Ms. Byers was convinced that it was suitable employment for Claimant, and she so persuaded him. Thus, notwithstanding his trepidations, Claimant succumbed to the pressure and sought the employment. The court, therefore, believes that Claimant's "choice" to apply for this job, as opposed to others, was made as a direct result of the pressure he felt from his employer's representative. In short, Claimant relied upon the job descriptions and advice given to him by Ms. Byers and applied for this position. He was, therefore, acting under the guidance and control of Employer when he applied for the job and was injured.

Moreover, the court does not believe it is a stretch to draw the conclusion that there is a direct causal connection between Claimant's work-related back injury and the neck injury he suffered while following the directions of Employer and its vocational counselor. The single fact remains that Claimant was under the control and supervision of Employer when he attended the job interview. The court is unpersuaded by Employer's reliance on cases decided by the Oregon Court of Appeals interpreting the Oregon Workers' Compensation statute, which requires that the compensable injury itself be a major contributing cause of the consequential condition. While a medical connection would provide further evidence of a causal connection, it is not required under the Act in order to invoke the § 20(a) presumption of a work-related injury.

The court is sympathetic to Claimant's situation. He was caught between his desire to return safely to work and Employer's desire to find him alternate employment regardless of his limitations. Claimant's act in choosing to apply for this particular position does not constitute an intervening act breaking the causal connection. Claimant acted in reliance upon the information given to him by Ms. Byers. This was the major contributing factor in his decision to apply for the job. The outcome may have been different had Claimant found this job on his own accord, however, this is not the case here. It is, therefore, true that but for Employer's vocational counselor's advice to Claimant, he would not have interviewed for the position or had occasion to test drive the bulldozer and been injured.

Rebuttal of Presumption

Once the presumption is invoked, the burden shifts to the employer to present specific and comprehensive evidence to rebut the presumption. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1081 (D.C. Cir.1976), *cert. denied*, 429 U.S. 820 (1976). Employer must provide substantial evidence in order to sever the potential connection between the disability and the work environment. *See Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 267 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Webb v. Corson & Gruman*, 14 BRBS 444, 447 (1981). If the presumption is overcome by the introduction of substantial evidence, the fact finder must evaluate all of the evidence and reach a decision based on the record as a whole. *See Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935); *see also Swinton*, 554 F.2d at 1081; *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151, 155 (1976).

In this case, Employer's evidence fails to sever the potential connection between Claimant's neck injury and his work environment. As the court established, *supra*, Claimant was engaged in activities "arising out of and in the course of employment" when he interviewed at Waste Management Services and test drove the bulldozer. There is no medical evidence or testimony on the record which severs the causal connection between Claimant's neck injury and driving the bulldozer. In fact, the medical evidence presented establishes that it was the jarring movement of the bulldozer which directly lead to the neck injury. Claimant suffered no cervical difficulties prior to the incident, and required neck surgery after the incident. Therefore, Employer has provided no evidence rebutting the causal chain.

Conclusion

The court finds that Claimant's neck injury is a compensable consequence of his initial work-related back injury. Claimant clearly suffered a harm, (neck injury and surgery). Claimant established that an accident occurred, arising out of and in the course of employment, which could have caused this injury. As such, Claimant has made a *prima facie* case and properly invoked the § 20(a) presumption that his injury is work-related. Employer has not met its burden of producing evidence to affirmatively negate the causal connection to a reasonable degree of medical certainty. Employer has not rebutted the presumption of a work-related injury. The resulting determination therefore is that the injury to Claimant's neck was in fact work-related. Thus, as Claimant was unable to work for certain periods as a result of his neck injury, he is entitled to total disability compensation.

Issue #2 - Claimant's Earning Capacity

The court has determined that Claimant's neck injury is a compensable consequence of the original back injury. After the neck injury, Claimant was totally disabled. Thus, the issue of Claimant's earning capacity is rendered moot and the court declines to address it further.

Issue #3 - Claimant's Psychiatric Condition

The final issue presented to this court concerns Claimant's alleged phobia of bridges and tunnels and whether this psychiatric condition is causally related to his work-related back injury. In order to invoke the § 20(a) presumption, the claimant must prove not only that he has a psychological impairment, but that an accident occurred or working conditions existed which could have caused the impairment. *Adams v. General Dynamics Corp.*, 17 BRBS 25 (1985). Once the claimant establishes the elements of a *prima facie* case, i.e., the existence of harm and working conditions which could have caused such harm, the presumption provides the causal nexus. The employer shall then have the opportunity to rebut this connection by providing evidence that severs the potential causal chain.

Upon evaluating the evidence in a light most favorable to Claimant, affording him the fruits of a beneficent Act, the court finds that Claimant has met the elements to properly invoke the § 20(a) presumption that his psychiatric condition is work-related.

Claimant has established a harm. As noted, *supra*, Claimant need not show that he has a specific illness or disease in order to establish that he has suffered harm, but need only establish some injury. Psychological impairment can be an injury under the Act. *See, e.g., Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979) (claimant's anxiety condition is compensable as an accidental injury). Claimant has a strong fear of heights, bridges, and tunnels. When he travels across a bridge or tunnel, he begins to feel a sharp achy pain run up in his back. He is unable to move in some instances and must pull his car over. He has an intense fear of bridges and tunnels. Thus, Claimant established the existence of a harm or injury.

Claimant has also provided evidence that an accident or conditions existed at work which could have contributed to this condition. Dr. Ashai, a psychiatrist licensed to practice in Virginia, examined Claimant upon agreement of counsel for both parties. She offered her opinion about his psychiatric condition, its cause, and a recommended course of treatment. She confirmed that although she could not opine as to the exact cause of Claimant's phobia, she found it relevant that his problems did not arise until after he suffered the work related injury. Moreover, she stated clearly that she could not rule out the work accident as a cause of Claimant's psychiatric condition. This supports the conclusion that Claimant's psychological condition could be causally related to the accident which occurred at work.

Accordingly, Claimant has established a *prima facie* case and the § 20(a) presumption is invoked to provide a causal nexus between his psychological harm and work environment.

The burden then shifts to Employer to rebut this presumption by providing evidence that claimant's condition was not caused by the employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). The employer must go forward with substantial countervailing evidence to sever the potential connection between the disability and the work environment. *See Sinclair v. Untied Food & Commercial Workers*, 23 BRBS 148 (1989). Mere hypothetical probabilities are insufficient, *Smith v. Sealand Terminal*, 14 BRBS 844 (1982), and the presumption is not rebutted simply by suggesting an alternate way that the claimant's injury might have occurred. *Williams v. Chevron, U.S.A.*, 12 BRBS 95 (1980).

The record contains the medical opinions of two psychiatrists, Dr. Paul Mansheim and Dr. Shaista Ashai, on this issue. Neither opinion purports to conclude that a causal connection in fact exists between Claimant's psychological problems and his work injury. Dr. Mansheim stated unequivocally that Claimant does not suffer from post-traumatic stress disorder and there is no cause and effect relationship between Claimant's phobias and a work-related incident. Dr. Ashai was somewhat more equivocal in her opinion, but failed to state to any degree of medical certainty that there is a causal connection between Claimant's injury at work and his psychological problems.

She stated that Claimant's phobias and panic attacks might be related to his work injury, yet she did not disagree with Dr. Mansheim's conclusion negating a connection.

Therefore, Employer has come forward with sufficient medical evidence to sever the connection between the psychological harm and employment or working conditions, thereby successfully rebutting the § 20(a) presumption of a causal nexus.

With the presumption rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). The court must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Id.* at 286.

In this case, the claim injury is Claimant's psychiatric condition concerning his phobia of bridges and tunnels. Thus, the question becomes whether there exists a preponderance of evidence to support Claimant's theory that either an accident occurred at work or work conditions existed which either caused or contributed to the condition. Upon evaluation of all evidence presented by both parties, absent the § 20(a) presumption, the weight of the evidence is clearly in favor of the Employer.

First, Claimant's testimony is not supported by the medical evidence. The mere fact that Claimant fears bridges and tunnels subsequent to his work-related injury is not sufficient to conclude that the condition was caused by the accident at work. Claimant testified at length about the circumstances of his initial back injury and agreed that his injury did not involve a tunnel or a bridge in any way, nor was he positioned on an unusually high pier. Furthermore, he admitted that when the injury occurred, "[i]t was just another day to me."

Accordingly, there appears to be no factual connection between the events leading up to and causing the back injury and any psychological impairment or phobia of bridges, tunnels, or heights. Therefore, there is no evidence to suggest or support the theory that Claimant's working conditions caused or contributed to his current phobias.

Furthermore, there is no medical evidence connecting the events at work with the current psychological condition. Both medical experts in this case deny the existence of a causal connection. Albeit Dr. Ashai's opinion may be interpreted as somewhat equivocal, she provides no opinion to a medical certainty of any tangible connection. This, coupled with Dr. Mansheim's strong language dispelling any connection, weighs against Claimant's attempt to persuade the court of a nexus. In short, both physicians are fully qualified to render expert medical opinions, and neither can provide the court with an opinion to any degree of medical certainty that a causal relationship exists. Both opinions corroborate and support each other, thus, the court finds there exists unequivocal evidence that Claimant's phobia of bridges and tunnels is not work-related.

Accordingly, the clear preponderance of the evidence shows that Claimant's current psychological impairment is not a work-related injury under the Act. Claimant is therefore not entitled to compensation for this condition.

CONCLUSION

After full consideration of the issues presented and the record as a whole, the court concludes that Claimant is entitled to periods of temporary total disability compensation as a result of the neck injury he sustained while driving a bulldozer. The court finds, however, that Claimant is not entitled to disability compensation for his psychological impairment, as it was not found to be work-related.

ORDER

It is hereby ORDERED that:

1. Claimant is entitled to temporary total disability compensation from July 12, 2001, to August 7, 2001, and from August 21, 2001, to March 4, 2002, at a rate of $553.33 per week as a result of his back and neck injuries. .

2. Employer is entitled to a credit for partial disability payments previously made to Claimant for these periods.

3. All computations are subject to verification by the District Director.

4. Employer is responsible for medical treatment for the neck injury in accordance with Section 7 of the Act.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/LLT